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In the Supreme Court of the United States

OCTOBER TERM, 1925

THE UNITED STATES OF AMERICA, PLAINTIFF IN error

v.

ISIDORE COHN

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF ON BEHALF OF THE UNITED STATES

PREVIOUS OPINIONS IN THE PRESENT CASE

No opinion was delivered by the District Court from which this case comes, save for the judgment and certificate appearing at R. 4–5.

GROUNDS OF JURISDICTION

The judgment to be reviewed is that of the District Court, under date of June 7, 1924, which appears at R. 4–5.

By that judgment the Court sustained a demurrer to the indictment in this case on the ground that the facts charged were not made

criminal by any statute of the United States. In a certificate filed in the case, the Judge stated (R. 5):

> No question of an interpretation of the indictment was involved in my decision.

The indictment (R. 1–3) was framed under Section 35 of the Penal Code, as amended by the Act of October 23, 1918, c. 194 (40 Stat. 1015). The Government contends that the facts charged in the indictment constitute an offense within the scope of that Section, and that under a proper construction of the Section the demurrer should have been overruled.

This is a writ of error sued out under that portion of the Criminal Appeals Act of 1907 which permits a direct writ of error to be taken on behalf of the United States—

> From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded. (Act of March 2, 1907, c. 2564 (34 Stat. 1264).)

The following cases are cited as sustaining the jurisdiction of this Court:

> *United States* v. *Comyns,* 248 U. S. 349.
>
> *United States* v. *New South Farm & Home Co.,* 241 U. S. 64, 72.
>
> *United States* v. *Nixon,* 235 U. S. 231, 236.

United States v. *Davis*, 231 U. S. 183.
United States v. *Patten*, 226 U. S. 525, 535.
United States v. *Keitel*, 211 U. S. 370.

In the case at bar the indictment charges that the defendant made certain fraudulent statements and concealed certain material facts, for the purpose of defrauding the Government of the United States by obtaining the approval of a certain claim. The trial judge held that the acts charged were not within the statute. From his certificate (R. 5) it is clear that the interpretation or construction *of the indictment* is not in issue. The sole question for determination is whether the acts charged are within the statute; and, as this Court said in *United States* v. *Patten* (supra, at p. 535):

> The court could not have decided, as it did, that the acts charged are not within the condemnation of the statute without first ascertaining what it does condemn, which, of course, involves its construction. Indeed, it seems a solecism to say that the decision that the acts charged are not within the statute is not based upon a construction of it.

The question here involved is whether the type of fraud charged in the indictment falls within the scope of a statute penalizing particular kinds of fraud. This is a question that is properly reviewable under the Criminal Appeals Act of 1907.

United States v. *Comyns,* 248 U. S. 349; *United States* v. *Davis,* 231 U. S. 183.

Under the doctrine of these cases, and of the others cited above, the jurisdiction of this Court under the Act is unquestioned.

STATEMENT

Isidore Cohn, the defendant herein, was indicted on September 29, 1923, for fraudulently concealing and misrepresenting certain facts, in order to defraud the Government by obtaining the approval of a claim against the officials of the Customs Service, contrary to Section 35 of the Penal Code as amended (Act of October 23, 1918, c. 194, 40 Stat. 1015).

The indictment (R. 1–3) sets forth the fraud at full length. The facts stated are these:

On October 1, 1920, 41 cases, containing over 1,000,000 cigars, arrived at Chicago from the Philippines for entry at the Customhouse, consigned to order "*Notify Cohn Bros. Cigar Co.*" This was the name under which the defendant conducted his business. On arrival, the cigars came into the possession of the Collector of the Port.

On October 2, 1920, the National Bank of the Republic, Chicago, received from the Philippine National Bank the bill of lading for the cigars, indorsed in blank by the consignor. To this bill were attached a draft upon "Cohn Bros. Cigar Co." for the purchase price, and a letter of in-

struction to the bank in Chicago *to deliver the bill of lading only upon payment of the draft.*

On October 4, 1920, *the draft not having been paid,* Cohn fraudulently procured an innocent third party (G. W. Sheldon & Co., customhouse brokers) to appear before the Collector and to secure for Cohn the possession of the cigars. The Collector was induced to permit the entry of the cigars, without the bill of lading, by Cohn's fraudulent statement that the bill of lading had not yet arrived in Chicago; and a bond for its production was given. The true state of affairs (that the bill of lading was then with the bank, that the draft had not been paid, and that Cohn was not entitled to make entry until he had paid it) was known to the defendant and was by him concealed from the Collector.

To this indictment Cohn demurred (R. 4) on the ground (*inter alia*) that the facts alleged did not constitute a crime within the meaning of Section 35 of the Penal Code. The District Court sustained the demurrer (R. 4–5). No opinion was delivered by the Court on this occasion; but a certificate (R. 5) was filed, reading as follows:

> This is to certify that in entering order on the seventh day of June, A. D. 1924, in the above-entitled cause, sustaining the demurrer and dismissing the proceedings, I was of the opinion that there was no statute of the United States making the matters charged in the indictment a crime. No

question of an interpretation of the indictment was involved in my decision.

The United States has sued out a writ of error under the Act of March 2, 1907, c. 2564 (34 Stat. 1246).

The construction or interpretation of the facts alleged is not in dispute. It is submitted that those facts are made a crime by Section 35 of the Penal Code, as amended, and that the construction placed upon that section by the District Court was erroneous.

SPECIFICATION OF ERRORS TO BE URGED

In sustaining the demurrer to the indictment in this case, the District Judge expressed the view (R. 5) that there was no statute of the United States making the matters charged a crime. The Government submits that this view is erroneous. Section 35 of the Penal Code, upon which the indictment was based, is sufficient to cover the facts here charged. All of the elements required by that section are present, and the demurrer should have been overruled.

STATUTES AND REGULATIONS INVOLVED

Section 35 of the Penal Code was amended by the Act of October 23, 1918, c. 194 (40 Stat. 1015), to read as follows:

> Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or

officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, *any claim upon or against the Government of the United States, or any department or officer thereof,* or any corporation in which the United States of America is a stockholder, *knowing such claim to be false, fictitious, or fraudulent;* or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, *or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof,* or any corporation in which the United States of America is a stockholder, *shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations,* or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry; * * * shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Section III, paragraph B, of the Tariff Act of October 3, 1913, c. 16 (38 Stat. 114, 181), amending Section 1 of the Act of June 10, 1890, c. 407 (26 Stat. 131) provides:

> That all merchandise imported into the United States shall, for the purpose of this Act, be deemed and held to be the property of the person to whom the same is consigned; and the holder of a bill of lading duly indorsed by the consignee therein named, or, if consigned to order, by the consignor, shall be deemed the consignee thereof; and in case of the abandonment of any merchandise to the underwriters the latter may be recognized as the consignee.

The Customs Regulations of 1915 (published under authority of the Secretary of the Treasury, and judicially noticed by this Court) provide:

> ART. 219. A bill of lading is necessary to establish the right to make entry in every case where it is the custom to issue such a document.
>
> Where, as in the case of express companies, it is the practice to issue shipping receipts in lieu of bills of lading, such receipts may be accepted for the purpose of entry.
>
> All merchandise imported into the United States shall be deemed and held to be the property of the person to whom the same is consigned, and the holder of a bill of lading indorsed by the consignee therein named, or if consigned to order by the consignor, shall be deemed the consignee thereof; and in case of the abandonment of any merchandise to the underwriters the latter may be recognized as the consignees.

> The collector may in his discretion permit entry to be made without the production of a bill of lading or express receipt, on a bond being filed conditioned for the subsequent production of such bill of lading and to indemnify the collector against any loss or damage which may be sustained by reason of permitting such entry to be made.
>
> ART. 220. Entry may be made by the consignee named in the bill of lading, or by the indorsee thereof, or by the holder of a bill of lading consigned to order and indorsed by the consignor.

The substance of Article 219 above is repeated with some changes in Article 257 of the Customs Regulations of 1923; and the substance of Article 220 is repeated in Article 261 of 1923. This indictment, however, charges an offense committed in October, 1920, some years before the promulgation of the 1923 Regulations. The case must therefore be governed by the Regulations of 1915.

ARGUMENT

SUMMARY

I. Under the facts as set forth in the indictment, the defendant was not entitled to make entry.

II. Section 35 of the Penal Code, properly construed, applies to the fraud in this case.

III. Section 35, *as amended,* is no longer restricted to frauds committed in the presentation of "*claims*" against the Government.

IV. Even if the element of a "*claim*" is held necessary to establish a case, that element is here present.

I

Under the facts as set forth in the indictment, the defendant was not entitled to make entry.

It is beyond all dispute that, under the facts charged in the indictment and admitted by the demurrer, the defendant was not properly entitled to make entry of the cigars. The bill of lading was not in his possession, but in the possession of the National Bank of the Republic. The Bank had definite instructions not to deliver the bill of lading until the goods had been paid for. Cohn had no right to possession either of the goods or of the bill of lading until he had paid the draft, which he never paid. Under Article 219 of the Customs Regulations and under the Tariff Act of 1913 (supra, pp. 7–8) Cohn was not the "consignee" and could not be deemed such, though the Collector knew he was interested in the shipment and was to be "notified" when the goods arrived. Had the true state of affairs been disclosed to the Collector, it is clear that he would have refused to deliver possession of the cigars to Cohn; and the indictment so alleges. (R. 3.)

But under Article 219 of the Customs Regulations the Collector had discretion to permit entry without the production of the bill of lading. To an abuse of this discretion Cohn's fraud was

directed. By his false statement that the bill of lading had not arrived in Chicago, and by his fraudulent concealment of the fact that the draft was unpaid, he induced the Collector to exercise his discretionary powers and to permit entry of the cigars on the giving of a bond for the production of the bill of lading. The responsibility for this fraud rests upon the defendant alone, though the actual execution of it was entrusted by him to an innocent third party. It is unnecessary to cite authorities in support of the maxim *Qui facit per alium facit per se.* It only remains to consider whether this fraud is punishable under a proper construction of the statute on which the indictment was based.

II

Section 35 of the Penal Code, properly construed, applies to the fraud in this case.

Section 35 of the Penal Code (supra, pp. 6–7) reaches all persons who—

> for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, * * * shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations.

The defendant is charged both with fraudulent concealment of material facts and with active

misstatement and misrepresentation. He concealed the fact that the draft was attached to the bill of lading and that it remained unpaid. He misstated the fact that the bill of lading had arrived in Chicago.

Did this amount to a "cheating and swindling or defrauding" the Government or any department thereof, within the meaning of Section 35 of the Penal Code? It is submitted that it *did.* In holding that it *did not,* the District Court clearly misconstrued that section.

The language of the section is aimed at the use of any scheme or device of a deceitful and fraudulent nature which is intended to defraud the Government or to secure from any Government officer or department, upon a claim of right, the possession of property in the hands of the Government. It requires from all persons truthful representations of fact and open-handed dealing. No person can procure, by deceit, the administration of any law in his favor, when he could not procure it by truthful dealing.

In the absence of decisions construing this section, we may properly resort to decisions under Section 37, penalizing *conspiracies* to defraud the Government. It is very clear that Section 37 extends to all deceitful practices for procuring official action not warranted by law or Departmental regulations.

As this Court said in *United States* v. *Plyler*, 222 U. S. 15, 17:

> It must now be regarded as established that "it is not essential to charge or prove an actual financial or property loss to make a case under the statute."

Or, as was said in *Haas* v. *Henkel*, 216 U. S. 462, 479:

> The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful functions of any department of Government.
>
> Cf. *United States* v. *Barnow*, 239 U. S. 74, 79.
>
> *United States* v. *Foster*, 233 U. S. 515, 526.
>
> *Wolf* v. *United States*, 283 Fed. 885, 887.
>
> *United States* v. *U. S. Brokerage Co.*, 262 Fed. 459, 460–461.
>
> *United States* v. *Fung Sam Wing*, 254 Fed. 500, 502.
>
> *Curley* v. *United States*, 130 Fed. 1, certiorari denied, 195 U. S. 628.

In the case of *Hammerschmidt* v. *United States*, 265 U. S. 182, 188, this Court declared:

> To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the

> Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention. It is true that the words "to defraud" as used in some statutes have been given a wide meaning, wider than their ordinary scope. They usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.

In the case at bar the Government, through its agent, the Collector, was in lawful possession of certain goods. The lawful course of procedure required that possession to remain undisturbed. No person could rightfully claim possession from the Government save upon production of the bill of lading or upon a *truthful* explanation of its absence. The defendant did not produce the bill of lading and is charged with deliberate falsehood in explaining its non-production. As a result of that falsehood, the Collector was induced to do what he would not have done had he known the truth.

The possession of valuable goods has been surrendered. It makes no difference that the ultimate title to those goods was not in the Collector or in the United States. Nor does it make any difference that the goods here involved were entitled to entry as "*free goods*" without the payment of duty, under Article 192 of the Customs

Regulations of 1915. The goods were none the less required to be *entered* (Customs Regulations of 1915, articles 192 and 193); and the Collector was entitled to custody of them in the orderly administration of the revenue laws. *United States* v. *Cutajar,* 60 Fed. 744. Cf. Rev. Stats. 2804, as amended by the Act of August 27, 1894, c. 349. s. 26 (28 Stat. 509, 552). 29 Op. Atty. Gen. 77. The Collector, as agent of the United States, had lawful possession, and that is sufficient. *United States* v. *U. S. Brokerage Co.* 262 Fed. 459. Of that possession he has been deprived by "deceit, craft, or trickery." It is submitted that under every test known to the law, a fraud has been perpetrated, and that it is properly punishable under Section 35 of the Penal Code.

III

Section 35 of the Penal Code, as amended, is no longer restricted to frauds committed in the presentation of "claims" against the Government.

But it may be argued that Section 35 of the Penal Code does not punish *all* frauds upon the Government; that its application is confined to those frauds which are connected with the presentation of false "*claims;*" and that no "*claim*" is here involved.

The Government contends that the element of a "*claim*" is in fact present in this case (v. infra, point IV). But even on the assumption that this

element is lacking, the Government's case is not affected; and the statute must still apply.

Prior to the amendment of 1918, Section 35 of the Penal Code was primarily a "false claims" statute; and a charge of fraud not committed in the presentation of a "*claim*" would have been insufficient. But by the amendment of 1918, the scope of the section was materially widened; and the element of a "*claim*" is no longer essential.

This point can best be demonstrated by a comparison of the section before and after the amendment:

ORIGINAL	AMENDED
Penal Code, s. 35 (Act of March 4, 1909, c. 321, 35 Stat. 1088, 1095, derived from Rev. Stats. 5438)	Penal Code, s. 35 (Act of October 23, 1918, c. 194, 40 Stat. 1015)
Whoever shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States,	
	or any department thereof, or any corporation in which the United States of America is a stockholder,
any claim upon or against the Government of the United States, or any department or officer thereof,	
	or any corporation in which the United States of America is a stockholder,
knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim,	
	or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall *knowingly and willfully falsify or conceal or cover up by any trick,*

ORIGINAL—continued	AMENDED—continued
	scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used
shall make or use, or cause to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry	
* * * shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.	* * * shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Prior to the amendment of 1918 there was no statute directed generally to the punishment of frauds upon the Government when committed by *one* person. Section 37 of the Penal Code reaches only *conspiracies* to defraud committed by two or more. The amendment to Section 35 was intended, in part at least, to remedy this defect in the law. It is true that even the amendment does not reach *all* frauds committed by one person against the United States. There may still be transactions which are punishable under Section 37 when two persons are involved, but which may be committed with impunity by one person. Section 35, even as amended, does not reach frauds which are committed without (1) the misrepresentation or (2) the concealment, of material facts. Cases of fraud may readily be imagined where neither of these elements would be present; and to such cases, apparently, the section would not extend.

But even though Section 35 may not reach *all* cases of fraud, still it does reach the case at bar.

It punishes the concealment or misrepresentation of material facts whenever the defendant's purpose is:

(1) to obtain the payment or approval of a claim, OR

(2) to cheat and swindle or defraud the United States or any department thereof.

By the terms of the Act, these purposes are made *alternative*. The existence of *both* in any case need not be shown. Either one is enough. It is a crime to misrepresent or conceal material facts *for the purpose of obtaining the payment or approval of a claim*. It is equally a crime to misrepresent or conceal material facts *for the purpose of defrauding the United States or any department thereof*. It is no longer necessary that the United States should be defrauded through the medium of a false claim. Other means will equally suffice. To confine the amended statute to false claims alone would deprive the amendment of all significance.

IV

Even if the element of a "claim" is held necessary to establish a case, that element is here present.

The Government's case, however, remains sound even though it be held that a false "*claim*" is necessary to bring the case within the statute. The indictment charges that the defendant (R. 1)—

> for the purpose and with the intent then and there on his part *of defrauding the*

> *Government of the United States and the Treasury Department thereof,* through a perversion and obstruction of the custom-house function thereof and of the proper and orderly administration of the laws of the United States and regulations of said department in that behalf made, unlawfully and feloniously did willfully conceal and cover up by a trick, scheme, and device material facts and cause to be made false and fraudulent statements and representations, then and there well knowing the same to be false and fraudulent, *for the purpose of obtaining the approval of a claim* of said Isidore Cohn to the possession of the imported merchandise hereinafter mentioned, upon and against the Government of the United States and said Treasury Department.

And the nature of the "claim" is then set forth in detail (R. 1-3).

That is to say, the indictment charges that the misrepresentations and the concealment of material facts were made with *both* of the purposes mentioned in the statute, namely, (1) with the purpose of defrauding the United States and (2) with the purpose of obtaining the approval of a false claim.

The Government has sought to show above that the requirements of Section 35 are satisfied if *either one* of these purposes exists. If it is sufficiently charged that the defendant has *defrauded* the United States by misrepresentation or conceal-

ment of material facts, it is unnecessary to show also that he has done it for the purpose of obtaining approval of a claim.

But if it be held that the element of a *claim* is essential to make a case, under Section 35, then that element is present in the case at bar.

"*Claim*" is defined by Bouvier (L. Dict. vol. 1, p. 332) as "the assertion of a liability to the party making it to do some service or pay a sum of money."

And Sir Edward Coke remarks (Co. Litt. 291b):

> *Demandum* is a work of art, and in the understanding of the common law is of so large an extent, as no other one word in the law is, unless it be *clameum,* whereof Littleton maketh mention.

Or, as stated by Mr. Justice Story in *Prigg* v. *Pennsylvania,* 16 Pet. 539, 615:

> What is a claim? It is, in a just juridical sense, a demand of some matter as of right, made by one person upon another to do or to forbear to do some act or thing as a matter of duty.

It is no part of the definition of a claim that it should be well founded. *Cornell* v. *Travellers' Insurance Co.,* 175 N. Y. 239, 252. Nor is it necessary that its object should be the payment of money; its object may equally well be the performance of services or (as in the present case) the surrender of a chattel.

It has repeatedly been held that offenses which involve the "*presenting of false claims against the United States*" are not confined to claims for money alone, or to matters over which the Court of Claims might have jurisdiction.

United States v. *Davis*, 231 U. S. 183.
United States v. *Spalding*, 3 Dak. 85.
United States v. *Bickford*, Fed. Cas. No. 14591.
United States v. *Wilcox*, Fed. Cas. No. 16691.

In the case at bar, the Collector of the Port, as an official of the Treasury Department, had lawful custody of certain goods. That custody was his, notwithstanding that the goods were free. *United States* v. *Fifty Waltham Watch Movements*, 139 Fed. 291; *Six Parcels of Placer Gold* v. *United States*, 8 Ariz. 389. And in the due administration of the customs law, he was properly entitled to retain it. Under certain conditions he had discretion to surrender custody to the person claiming the goods. By fraudulent misrepresentation and by concealment of facts, the defendant set up a claim or color of title to the goods, and induced the Collector to believe his story and to surrender his custody. It is submitted that to obtain possession of the goods was to obtain the "*approval of a claim.*" And to obtain it by fraud was an offense under Section 35.

CONCLUSION

It is therefore respectfully submitted that the District Court erred in construing Section 35 as inapplicable to the facts here charged. The judgment of the District Court sustaining the demurrer should be overruled; and the cause should be remanded for trial.

WILLIAM D. MITCHELL,
Solicitor General.
WILLIAM J. DONOVAN,
Assistant to the Attorney General.

AUGUST, 1925.

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No. 130

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1925.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

ISIDORE COHN,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

BENJAMIN P. EPSTEIN,
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HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1925.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.

ISIDORE COHN,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT.

This writ of error is prosecuted by the Government under the Criminal Appeals Act of 1907* to review a judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division sustaining a demurrer interposed by defendant in error to an indictment under Section 35 of the Federal Penal Code, as amended by the Act of October 23, 1918, C. 194; 40 Stat. L. 1015.

Defendant in error was charged with having obtained (through concealment of the fact that a bill of lading with draft attached had arrived) the entry of *duty free cigars*

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*Act of March 2, 1907, c. 2564. (34 Stat. L. 1264.)

consigned to him from the Philippine Islands without producing the bill of lading therefor but by filing a bond indemnifying the collector, as provided for by Article 219 of the Customs Regulations of 1915. The particular misrepresentation charged is that defendant in error at the time of the filing of the bond concealed from the collector the fact that the bill of lading was then in the National Bank of the Republic at Chicago.

The cigars were duty free. Nothing was due and owing to the Government on this consignment. And under Article 220 of the Customs Regulations of 1915, "Entry may be made by the consignee named in the bill of lading," without reservation as to whether the consignee paid the consignor for the goods. The indictment does not charge that the Government was defrauded of any duties thereon or that the Government sustained any financial or property loss whatsoever but proceeds on the theory that the Government and the Treasury Department were defrauded "through a perversion and obstruction of the custom house function thereof and of the proper and orderly administration of the laws of the United States and regulations of said department in that behalf made." (Rec. 1.)

The Indictment

In view of the importance of an accurate statement of the charge of the indictment, we believe that your Honors' convenience will be best subserved by quoting the facts directly from the indictment at this juncture (Rec. 1):

> "That Isidore Cohn, late of the city of Chicago, in said division and district, on October 4, 1920, for the purpose and with the intent then and there on his part of defrauding the Government of the United States and the Treasury Department thereof, through a perversion and obstruction of the customhouse function thereof and of the proper and orderly administration of the laws of the United States and regulations of said department in that

behalf made, unlawfully and feloniously did willfully conceal and cover up a trick, scheme, and device material facts and cause to be made false and fraudulent statements and representations, and then and there well knowing the same to be false and fraudulent, for the purpose of obtaining the approval of a claim of said Isidore Cohn to the possession of the imported merchandise hereinafter mentioned, upon and against the Government of the United States and said Treasury Department; that is to say:

On October 1, 1920, 1,005,000 cigars contained in 41 cases, each of said cases bearing one of the following serial numbers, to wit, 300 to 340, both inclusive, and marked 'A. H., Chicago,' and in 32 cases, each bearing one of the following serial numbers, to wit, 321 to 352, both inclusive, and marked 'C. B. C. Co., Chicago,' and in 12 cases, each bearing one of the serial numbers 1 to 12, both inclusive, and marked 'C. B. C. Co., Chicago,' arrived at said city of Chicago from the Philippine Islands under consular manifest No. 314, for entry at the customhouse of the United States at Chicago aforesaid, consigned to order 'notify Cohn Bros. Cigar Co.' and then and there came into the possession of the collector of customs of the United States for the port and district of Chicago.

On October 2, 1920, The National Bank of the Republic, at Chicago aforesaid, received from the Phillippine National Bank of Manila, in the Phillipine Islands, a bill of lading covering said cigars and indorsed in blank by the consignor of said cigars, to wit, Aguado Hermanos, to which bill of lading a draft upon 'Messrs. Cohn Bros. Cigar Co.' for $29,063.32, drawn by said Aguado Hermanos, was attached, with instructions to said National Bank of the Republic to deliver said bill of lading only upon payment of said draft.

On said October 4, 1920, said draft not then having been paid, said Isidore Cohn was doing business at Chicago aforesaid under the name of Cohn Bros. Cigar Co., and, then and there well knowing all the premises aforesaid, fraudulently procured G. W. Sheldon & Co., then customhouse brokers at Chicago aforesaid, to appear at the office of said collector of customs at Chicago aforesaid, in said judicial division and district, and make

entry of said cigars in behalf of said Isidore Cohn (doing business under said name of Cohn Bros. Cigar Co.) at said customhouse, and secure from said collector for him, the said Isidore Cohn, the possession of said cigars, without the production of said bill of lading, and upon the giving of said collector of a bond in the sum of $50,000.00 for the production of said bill of lading, upon false and fraudulent statements and representations, then and there made by him the said Isidore Cohn to said G. W. Sheldon & Co., and through said G. W. Sheldon & Co., as innocent agents of him the said Isidore Cohn, to said collector, to the effect that said bill of lading had not then arrived in Chicago, and that he the said Isidore Cohn was entitled to make entry and secure possession of said cigars from said collector, and then and there fraudulently concealed from said G. W. Sheldon & Co., and from said collector, the material facts that said draft had arrived at Chicago as aforesaid and was attached to said bill of lading with the condition aforesaid, and had not then been paid as aforesaid, and that he the said Isidore Cohn then and there was not entitled to make entry and secure possession of said cigars under the circumstances aforesaid, and thereby induced said collector to deliver possession of said cigars to him the said Isidore Cohn, through said G. W. Sheldon & Co., when he the said collector would and should have refused so to do if the facts of the arrival of said bill of lading and of said draft and condition of the nonpayment of said draft, and of said Isidore Cohn's consequent want of right to make said entry or procure such possession of said cigars from said collector, had been known to said collector; which said statements and representations then and there were false, as said Isidore Cohn, when so making the same, there well knew, in that said draft had in fact arrived at Chicago as aforesaid, and in that said Isidore Cohn, by reason of the circumstances aforesaid, was not then and there entitled to make entry or obtain possession of said cigars."

Treasury Regulations Involved.

The following departmental regulations are involved in this case:

Article 219 of the Customs Regulations of 1915, which provides:

> "ART. 219. A Bill of lading is necessary to establish the right to make entry in every case where it is the custom to issue such a document.
>
> Where, as in the case of express companies, it is the practice to issue shipping receipts in lieu of bills of lading, such receipts may be accepted for the purpose of entry.
>
> All merchandise imported into the United States *shall be deemed and held to be the property of the person to whom the same is consigned,* and the holder of a bill of lading indorsed by the consignee therein named, or if consigned to order by the consignor, shall be deemed the consignee thereof; and in case of the abandonment of any merchandise to the underwriters the latter may be recognized as the consignees.
>
> *The collector may in his discretion permit entry to be made without the production of a bill of lading or express receipt,* on a bond being filed conditioned for the subsequent production of such bill of lading and to indemnify the collector against any loss or damage which may be sustained by reason of permitting such entry to be made."

Article 220 of the Customs Regulations of 1915 provides:

> "Art. 220. Entry may be made by the consignee named in the bill of lading, or by the indorsee thereof, or by the holder of a bill of lading consigned to order and indorsed by the consignor."

On June 7, 1919, the Treasury Department issued the following circular to collectors of customs as contained in 36 Treas. Dec. No. 38042, page 476:

"Bond to produce bill of lading

Treasury Department.

June 7, 1919.

To collectors of customs:

A bond to produce bill of lading, customs Cat. No. 7581, has been added to the catalogue of blank forms. *This bond, the acceptance of which is within your discretion, is to indemnify and protect you personally against any loss or damage which may be sustained by reason of permitting entry to be made without production of a bill of lading, as set forth in Article* 219 *of the Customs Regulations of* 1915. The bond is put up in pads of 100 blanks each and will be sold at the price of other blank forms—namely 25c per pad of 100.

If any of these forms are required by you for office use or free distribution you may set aside one or more pads for that purpose, not to exceed 10 per cent of the supply, and will take credit in your account of blank forms for the number so set aside.

Requisition for these forms will be honored after July 1, 1919.

L. S. Rowe,
Assistant Secretary."

BRIEF.

I.

Under the facts set forth in the indictment, the defendant was entitled to make entry; and even if he were not, no offense is stated.

1. The cigars were free of duty. The Government lost nothing; and the collector lost nothing. The only purpose of the bond was to protect the collector personally.

2. Article 220 of the 1915 Customs Regulations provides that "Entry may be made by the consignee named in the bill of lading." No reservation appears therein as to indebtedness running from the consignee to the consignor.

3. There is no provision in the 1913 Tariff Act whereby a violation of Articles 219 and 220 of the Customs Regulations of 1915 may be declared to be criminal offenses.

4. A violation of a departmental regulation is not a crime unless the statute under which the regulation was promulgated specifically and definitely provides that specific violations shall be criminal offenses.

United States v. *Eaton*, 144 U. S. 677.

5. The Underwood Tariff Act of 1913, provides penalties for only those fraudulent practices relating to entry "by means whereof the United States shall or may be deprived of the lawful duties, or any part thereof."

Paragraph G., Section III Ch. 16 of Act of October 3, 1913, 38 Stat. L. 183.

(*a*) *As to* 1909 *Tariff Act*:
United States v. *Salen,* 235 U. S. 237, 250.

(*b*) *As to Tariff Act of* 1890:
United States v. *Ninety-Nine Diamonds,* 139 Fed. 961, 965, (C. C. A. 8th Cir.)

6. "The Act of Congress (Tariff Act of 1890) in which this section is found is not a code of moral laws enacted to command truth and punish falsehood. It is an Act to aid in the collection of the revenues of the United States. The purpose which the Congress sought to accomplish was neither moral nor ethical, but economic and mercenary. The evil which it endeavored to remedy was not the commission of falsehood or perjury, but the deprivation of the United States of its lawful revenues."

II.

Prior to the 1918 amendment, section 35 of the Penal Code was the federal false claims statute wherein the gist of the offense interdicted was financial or property loss by the government.

1. Section 35 was drawn from old R. S. 5438, as amended in 1908.

(*a*) Act of March 2, 1863, Ch. 67, 12 Stat. L. 696,698, amended by

(*b*) Act of May 30, 1908, Ch. 235, 35 Stat L. 555.

(*c*) Both (*a*) and (*b*), *supra,* were included in the repealing clause of Section 341 of the Penal Code, 35 Stat. L. 1153, 1159.

2. "The object of the statute (R. S. 5438) is to prohibit and punish the drawing of *money* from the treasury of the

United States without having rendered legal and recognized equivalents."

United States v. *Bittinger*, 24 Fed. Cas. No. 14599, p. 1150.

United States v. *Moore*, 3 MacArthur (D. C.) 226, 235.

United States v. *Hull*, 14 Fed. 324, 326.

3. "It is a matter of history that this legislation was intended namely to put a stop to the practice which was said to prevail at the City of Washington and elsewhere, where claim agents and lobbyists, acting on behalf of others, were in the habit of manufacturing false and fictitious testimony —pension agents, and other agents of that character."

United States v. *Hull*, 14 Fed. 324, 326.

III.

The 1918 amendment to section 35 extends the penalty thereof to false claims against corporations in which the United States is a stockholder and to certain instances of disposal of property belonging to the Army and Navy. The requisite element of financial or property loss to the government is preserved in the amendment.

1. The Government's brief is mistaken in its assertion that there is "an absence of decisions" on Section 35 as amended in 1918. Both this court and the Circuit Court of Appeals for the Eighth Circuit have construed the 1918 amendment and have ruled that the original purpose of the section remains.

United States v. *Bowman*, 260 U. S. 94, 96.

Kurzrok v. *United States*, 1 Fed. (2d Ser.) 209, 210 (C. C. A. 8th Cir.).

2. "In these circumstances we are entitled to avail ourselves of such light as the history of the steps taken in the enactment of the law, as disclosed by the legislative records, may afford."

United States v. *Burr,* 159 U. S. 78, 85.

3. On October 3, 1918, the session of the House at which the House Committee Amendment of Senate Bill No. 3470 (the present form of Section 35) was ordered to be read a third time and passed, during the course of the debate Congressman Igoe said:

> "Mr. Speaker, the chairman of the committee is not present, *but the only amendments to the existing law are the extension of the penalty of this act to false and fraudulent claims that are presented against corporations in which the United States is a stockholder, and* also punishment of the disposal of the property belonging to the Army or Navy and pledging it, or selling it or disposing of it wrongfully."

Congressional Record, Vol. 56, part 11, (65th Congress) page 11118, October 3, 1918.

(*a*) On October 14, 1918, on Senator Overman's motion that the Senate concur in House amendment the motion was agreed to.

Congressional Record (65th Congr. 2d Sess.) Vol. 56 part 11, page 11214.

4. Section 35 and the statutes upon which it is based have stood since 1863, as a system of law penalizing false claims against the Government whereby the Government is subjected to financial or property loss. Without specific and positive language or necessary implication, an existing system of legislative provision is never repealed.

Wilmot v. *Mudge,* 103 U. S. 217.

IV.

Decisions under Section 37 of the Penal Code penalizing conspiracies to defraud the Government do not apply to Section 35.

1. "Section 37 of the Criminal Code makes it an offense to conspire to defraud the United States *in any manner or for any purpose.*"

United States v. *Foster,* 233 U. S. 515, 526.
Hammerschmidt v. *United States,* 265 U. S. 182, 187.
See Argument.

2. Under Section 35 financial or property loss to the Government is necessary.

Authorities under II and III, *supra.*

3. The recital in the 1918 amendment to Section 35: "*Cheating and swindling or defrauding* the United States" refers solely to pecuniary, financial or property loss.

(*a*) "Cheating" involves *pecuniary injury.*

People v. *Cummings,* 114 Calif. 437, 439.

(*b*) "Swindling" likewise involves pecuniary injury.

Cunningham v. *Baker,* 104 Ala. 160, 171.

(*c*) "Defrauding" in association with "cheating and swindling" means pecuniary injury.

(*d*) *Noscitur a sociis* is a rule of construction of statutes.

Virginia v. *Tennessee,* 148 U. S. 503, 519.
United States v. *Rodgers,* 150 U. S. 249, 278.

(*e*) "There is no mode by which the meaning affixed to any word or sentence by a deliberative body, can be so well ascertained, as by comparing it with the words and sentences with which it stands connected."

Wheaton v. *Peters,* 8 Pet. (U. S.) 591, 661.

V.

There is no element of a "claim" against the Government in the instant case.

See argument.

ARGUMENT.

I.

Under the facts set forth in the indictment, the defendant was entitled to make entry; and even if he were not, no offense is stated.

The Government's argument that defendant was not entitled to make entry because the bill of lading was in the possession of the National Bank of the Republic is denied and contradicted by the express provision of Article 220 of the 1915 Customs Regulations:

> "*Entry may be made by the consignee named in the bill of lading,* or by the indorsee thereof, or by the holder of a bill of lading consigned to order and indorsed by the consignor."

Thus it is apparent that any one of the three classes of persons may make entry under Article 220 without preference.

The fact that the bank had instructions from the consignor not to deliver the bill of lading until payment was made by defendant does not place the bank in a preferred position. Neither the Tariff Act of 1913, nor the Customs Regulations of 1915, is concerned with the civil liability of the consignee to the consignor for the imported merchandise. Article 220 of the 1915 Customs Regulations, *supra,* confers upon the consignee named in the bill of lading (without reservation of any sort) the right to make entry. Certainly defendant was "the consignee named in the bill of lading." The goods were free from duty and there was nothing due and owing to the Government.

Article 219 of the 1915 Customs Regulations, (p. 5, *ante*) is a measure to protect the collector personally. The collector is personally liable to the Government for all duties on imported merchandise passing through his hands; hence the provision authorizing the collector to waive production of the bill of lading upon the giving of bond. As stated in the circular issued by the department for the guidance of collectors of customs (36 T. D. No. 38042, p. 476; set forth in full p. 6, *ante*):

> "This bond the acceptance of which is within your discretion, *is to indemnify* and *protect you personally against any loss or damage* which may be sustained by reason of permitting entry to be made without production of a bill of lading, as set forth in Article 219 of the Customs Regulations of 1915."

By Article 220 of the Regulations provision is made for the classes of persons who may make entry. And the recital thereof "entry may be made by the consignee named in the bill of lading or," etc., is not subject to any reservation.

The first section of Article 219 of the Regulations does not conflict with this view:

> "A bill of lading is necessary to establish the right to make entry in every case where it is the custom to issue such a document."

But there was a bill of lading in this case and said bill recited the consignment of cigars to defendant.

The context of Article 219, as already stated is a definition of the tasks imposed upon the collector in the collection of duties and is not a specification of the persons who may make entry. The latter is provided for by Article 220, *supra*.

At page 11 of the Government's brief the contention is made that

> "By his false statement that the bill of lading had not arrived in Chicago, and by his fraudulent conceal-

ment of the fact that the draft was unpaid, he induced the collector to exercise his discretionary powers and to permit entry of the cigars on the giving of a bond for the production of a bill of lading."

In other words, the Government's contention is that a violation of the fourth Section of Article 219 of the Regulations constitutes a crime. But nowhere in the 1915 Tariff Law is there provision that a violation of any such regulation thereafter to be made by the department shall be a criminal offense or shall subject the violator to any sort of penalty.

It is elementary that a violation of a departmental regulation does not constitute a crime unless the law empowering the department to make the regulation expressly and definitely provides therefor.

In *United States* v. *Eaton,* 144 U. S. 677, this Court in answering in the negative questions certified on a certificate of division of opinion between the Judges of the Circuit Court of the United States for the District of Massachusetts on demurrer to an indictment for violating a regulation of the commissioner of internal revenue as to the manufacture and sale of oleomargarine, at page 688, says:

"It is necessary that a sufficient statutory authority should exist for declaring any Act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in § 41 of the Act of October 1, 1890.

Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regularly prescribed by law, so as to lawfully support acts done under them and in accordance with them, and may thus have in a proper sense, the force of law; but it does not follow that a thing required

by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense. The questions certified are answered in the negative."

Even though the 1913 Tariff Act had contained a provision making it a criminal offense to violate certain regulations made by the department pursuant thereto, the situation would still be the same; for the penalty section of that act, in its reference to entry, is limited specifically to offenses *whereby the Government suffers financial loss through loss of duties.*

Paragraph G,* Section III, Ch. 16 of the Underwood Tariff Act of October 3, 1913 (38 Stat. L. 183) provides penalties for only those fraudulent practices *"by means whereof the United States shall or may be deprived of the lawful duties, or any part thereof."*

In the face of the above section, if it be admitted, for the sake of the argument, that a volation of Articles 219 and 220 of the Customs Regulations of 1915 made the offender liable to the punishment provided for by Paragraph G, *supra*, the fact that the Government *lost no lawful duties what-*

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* Said paragraph "G" is as follows (38 Stat. L. 183):

"That if any consignor, seller, owner, importer, consignee, agent, or other person or persons, shall enter or introduce, or attempt to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall make any false statement in the declarations provided for in paragraph F without reasonable cause to believe the truth of such statement, or shall aid or procure the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, or shall be guilty of any willful act or omission by means whereof the United States shall or may be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by such act or omission, such person or persons shall upon conviction be fined for each offense a sum not exceeding $5,000, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court: Provided, That nothing in this section shall be construed to relieve imported merchandise from forfeiture by reason of any such false statement or for any cause elsewhere provided by law."

soever in this case would be a complete bar to such a prosecution.

It is thus apparent that neither the regulations nor the 1913 Tariff Act provide for penalty in cases of entry of duty free merchandise.

In *United States* v. *Salen*, 235 U. S. 237, the Court, in affirming a judgment of the District Court for the Southern District of New York sustaining a demurrer to an indictment for making false statements in the sworn declaration required of consignees by the Tariff Act of 1909, held that the concealment by an agent consignee of imported goods of extraneous evidentiary facts not proper to be included in the invoice, account and bill of lading attached to his declaration, but which, if brought to the attention of the collector would have excited the latter's suspicion, and have induced him to institute a special inquiry as to the value of the merchandise mentioned in the account and invoice, is not a violation of Section 28 of the Act of August 5, 1909 (36 Stat. L. 11, 95, Ch. 6), making it a felony for an agent consignee to state falsely in his declaration that "nothing has been on my part, nor, to my knowledge, on the part of any other person, concealed or suppressed whereby the United States may be defrauded of any part of the duties lawfully due on the said goods, wares and merchandise," at page 250, says:

> "But to say that in signing the stautory form of declaration consignee should in effect answer specific questions and at the same time be required, on peril of committing a felony, to disclose extraneous evidentiary facts as to which no direct question was asked, and to which his attention was not directed, is to make the declaration serve a purpose for which it was not intended, and spread a net that might catch the unwary as well as the fraudulent consignee. *United States* v. *Reese*, 92 U. S. 221, 23 L. Ed. 565. ***For under the contention of the plaintiff in error, it is not necessary that Salen should have intended to defraud,*** or ***that the government should have been actually defrauded.*** The crime was commit-

> ted if the United States 'may have been defrauded.' So that even if the foreign value on which the duty was assessed had been truly stated in the declaration, the consignee would yet be guilty of a felony if he failed to call attention to facts which would have excited the collector's suspicion and induced him to demand a reappraisement. Such an interpretation of the statute is not only contrary to the rule which restricts the operation of the suprression clause to the particular matters enumerated in all other parts of the printed declaration, but would fix no standard by which to draw the line between innocent silence and felonious concealment."

Customs regulations are not concerned with morality. Their purpose is not to establish a code of honor between the native importer and foreign exporter. The avowed object and purpose of those regulations is economic and mercenary, not ethical. In short, the collection of duties, the receipt of revenue, the financial gain to the Government—these are the objects of such regulations.

In *United States* v. *Ninety-Nine Diamonds,* 139 Fed. 961 (C. C. A. 8th Cir.), an action by the Government to confiscate ninety-nine diamonds under the Act of June 10, 1890, Chap. 407, § 9, 26 Stat. L. 135, for the administration of the customs, upon the ground that the claimant, Henry Bockstruck, in making his entry, declared that he was the owner and that Simon Fink was the seller of the merchandise, when the truth was that he was the consignee and Fink was the assignor, the Court of Appeals for the Eighth Circuit, per Circuit Judge Sanborn, in holding that none of the acts denounced by Section 9 of the 1890 Tariff Act constitute an offense thereunder unless it deprives the Government of lawful duties, at page 965, says:

> "It does not seem to be a sensible interpretation of the statute to hold that one who is guilty of a wilful act or omission in the entry of his goods is exempt from the forfeiture, fines and penalties prescribed by the section unless his act or omission deprives the government of its duties, while one who uses a false letter or state-

ment in making his entry is liable to them although his act has no effect upon the revenue. The object which the legislative body sought to attain and the evil which it was endeavoring to remedy may always be considered for the purpose of ascertaining its intention. * * * *The act of Congress in which this section is found is not a code of moral laws enacted to command truth and punish falsehood. It is an act to aid in the collection of the revenues of the United States. The purpose which the Congress sought to accomplish was neither moral nor ethical, but economic and mercenary. The evil which it endeavored to remedy was not the commission of falsehood or perjury, but the deprivation of the United States of its lawful revenues.*"

In *United States* v. *Ninety Nine Diamonds,* supra, the Court of Appeals for the Eighth Circuit in disapproving of the ruling in *United States Cutajar,* 60 Fed. 744 (C. C. S. D. N. Y, cited at page 15 of the Government's brief) at page 963:

"The contention of counsel for the government is that the clause by means whereof the United States shall be deprived of the lawful, duties or any portion thereof is limited in its effect to the crime of using and 'willful act or omission,' and that all the other offenses denounced by this section are complete, although they have no effect upon the collection of the duties and are not intended to, and do not deprive the government of any portion of them. In this position he is sustained by two decisions of the Circuit Court of the Southern District of New York. *U. S.* v. *Cutajar,* (C. C.) 60 Fed. 744; *U. S.* v. *Rosenthal,* (C. C.) 126 Fed. 766, 776. *The respect and deference which the opinion of the learned judges who rendered these decisions always command have invoked a careful and deliberate consideration of the reasons they suggest for their views and of the arguments of counsel; but they have not proved convincing.*"

Another case cited by the Government in this connection is *United States* v. *United States Brokerage & Trading Co.,* 262 Fed. 459 (Dist. Ct. S. Dist. N. Y.), which though based on Section 37, still says (460):

"The counts for conspiracy to defraud the United States are clearly good from any aspect. It is no con-

> cern of the defendants whether or not the United States had the right to sell 'astray freight.' It was at least a bailee of that freight, and, though the sale were wrongful, it was entitled to the possession of the proceeds. To appropriate those proceeds was either to impede the United States in its duty of discharging its liability to the consignees, if the sale was illegal * * * or if the United States had the right to sell the goods *then it was a direct misappropriation of funds of the United States,* because upon that hypothesis the proceeds could be truly described as a part of the operating profits of the railway; *i. e.,* as 'railway operating income,' under section 1 of the Federal Control Law."

The citation of the opinion of the Attorney General (Gov. Brief, 15; 29 Op. Atty. Gen. 77, May 10, 1911) has absolutely nothing to do with this case. All that opinion relates to is

(*a*) That Section 2804 R. S. which forbids the entry of cigars for less quantity than 3,000 in a single package, applies to cigars coming into the United States from the Philippine Islands; and

(*b*) That cigars and cigarettes brought into the United States from the Philippine Islands are subject to the internal revenue tax under Section 5 of the Tariff Act of August 5, 1909 (36 Stat. 83), and internal revenue stamps in payment of such tax are required to be affixed to the packages containing the same.

The indictment in this case does not set up facts involving either of those situations.

Let us proceed to examine the Government's theory that the alleged deceitful procurement of the exercise of the collector's discretion constitutes a violation of Section 35 as amended in 1918.

II.

Prior to the 1918 amendment, Section 35 of the Penal Code was the federal false claims statute wherein the gist of the offense interdicted was financial or property loss by the Government.

Section 35 of the Penal Code (35 Stat. L. 1095) was drawn from R. S. 5438 (Act of March 2, 1863, Ch. 67; 12 Stat. L. 696, 698) as amended by the Act of May 30, 1908, Ch. 235, 35 Stat. L. 555. Both Section 5438 R. S. and the Act amendatory thereof were embraced within the repealing clause of Section 341 of the Penal Code (35 Stat. L. 1153-1159).

The subjoined chart shows both Section 35 of the Code as originally enacted and as amended in 1918. The additional matter contained in the amendment is in italics.

Original.	**As Amended.**
Penal Code, S. 35 (Act of March 4, 1909, C. 321, 35 Stat. 1088, 1095, derived from Rev. Stats. 5438).	Penal Code, S. 35 (Act of October 23, 1918, C. 194, 40 Stat. 1015).
Whoever shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military or naval service of the United States,	Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, *or any department thereof, or any corporation in which the United States of America is a stockholder,*
any claim upon or against the Government of the United States, or any department or officer thereof,	any claim upon or against the Government of the United States, or any department or officer thereof, *or any corporation in which the United States*

Original.	As Amended.
knowing such claim to be false, fictitious or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim,	*of America is a stockholder,* knowing such claim to be false, fictitious or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, *or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or*
shall make or use, or cause to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement or entry;	make or use or cause to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement or entry; *or whoever shall take and carry away or take for his own use, or for the use of another, with intent to steal or purloin, any personal property of the United States, or any branch or department thereof, or any corporation in which the United States of America is a stockholder;*
or whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof.	or whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, *or any corporation in which the United States of America is a stockholder,* by obtaining or aid-

Original.	As Amended.
by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim; or whoever, having charge, possession, custody, or control of any money or other public property used or to [sic] be used in the military or naval service, with intent to defraud the United States	ing to obtain the payment or allowance of any false or fraudulent claim; or whoever, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, with intent to defraud the United States *or any department thereof, or any corporation in which the United States of America is a stockholder,*
or willfully to conceal such money or other property, shall deliver or cause to be delivered to any person having authority to receive the same, any amount of such money or other property less than for which he received a certificate or took a receipt; or whoever, being authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing or other property so used or to be used, shall make or deliver the same to any other person without a full knowledge of the truth of the facts stated therein and with intent to defraud the United States	or willfully to conceal such money or other property, shall deliver or cause to be delivered to any person having authority to receive the same, any amount of such money or other property less than for which he received a certificate or took a receipt; or whoever, being authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing or other property so used or to be used, shall make or deliver the same to any other person without a full knowledge of the truth of the facts stated therein and with intent to defraud the United States, *or any department thereof, or any corporation in which the United States of America is a stockholder,*
shall be fined not more than $10,000 or imprisoned not more than five years, or both, And whoever shall purchase, or receive in	shall be fined *not more than* $10,000 *or imprisoned not more than ten years, or both. And whoever shall purchase, or receive in pledge, from any person any*

Original.	As Amended.
pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service, any arms, equipments, ammunition, clothes, military stores, or other public property, whether furnished to the soldier, sailor, officer, or person under a clothing allowance or otherwise such soldier, sailor or other person not having the lawful right to pledge or sell the same shall be fined not more than five hundred dollars, and imprisoned not more than two years.	*arms, equipment, ammunition, clothing, military stores, or other property furnished by the United States under a clothing allowance or otherwise, to any soldier, sailor, officer, cadet or midshipman in the military or naval service of the United States or of the National Guard or Naval Militia, or to any person accompanying, serving or retained with the land or naval forces and subject to military or naval law, having knowledge or reason to believe that the property has been taken from the possession of the United States or furnished by the United States under such allowance,* shall be fined *not more than* $500 *or imprisoned not more than two years, or both."*

In *United States* v. *Bittinger,* 24 Fed. Cas. No. 14599, p. 1150, District Judge Krekel in charging a jury in a prosecution under Section 5438 U. S. R. S. (the precursor of Section 35 of the Penal Code) says (p. 1150):

> "The indictment charges the defendant with having made false claims against the United States, knowing them to be false, fictitious and fraudulent. Section 5438 of the United States Statutes under which the indictment is drawn, provides: 'Every person who makes or causes to be made or presents or causes to be presented for *payment or approval* * * * *any claim upon* or *against the government of the United States, or any department thereof,* knowing such claim to be false, fictitious or fraudulent, shall be imprisoned,' etc. By making a claim, as defined in this statute, is meant the asking or demanding on the part of the defendant of the government payment for services. The term 'false,' used, means 'unfounded' or 'unjust'; by 'fictitious' is

meant 'not real'; by 'fraudulent,' 'wrong' or 'deceitful.' These terms have no special legal signification in their use in this statute, but are to be taken by you in their ordinary and well-understood sense. The language of the statute and indictment is 'knowing such claim to be false, fictitious, and fraudulent.' By the word 'knowing,' as here used, is meant the having a certain and clear perception of the falsity of the claim made. *The object of the statute is to prohibit and punish the drawing of money from the treasury of the United States without having rendered legal and recognized equivalents.*"

So in *United States* v. *Moore,* 3 Mac Arthur (D. C.) 226, Mr. Justice Mac Arthur, says (235):

"Section 5438 (precursor of the present Section 35) already referred to, prohibits every person from presenting for payment or approval to or by any person or officer in the civil, military or naval service of the United States any claim upon or against the government of the United States, knowing such claim to be false, fictitious or fraudulent, or from making any false voucher or receipt, or from entering into any agreement, combination or conspiracy to defraud the United States, or any department or officer thereof, *by obtaining or aiding to obtain the payment or allowance* of any false or fraudulent claim. The object of this statute is apparent. It was to protect the government against fraudulent claims presented to its officers for *settlement,* and was never designed to apply to the prosecution of claims before a tribunal like the Court of Claims."

In *United States* v. *Hull,* 14 Fed. 324, Circuit Judge McCrary says of the object and purpose of the old Section 5438 R. S. (p. 326):

"It is a matter of history that this legislation was intended mainly to put a stop to the practice which was said to prevail at the city of Washington and elsewhere, where claim agents and lobbyists, acting on behalf of others, were in the habit of manufacturing false and fictitious testimony—pension agents, and other agents of that character."

Let us, therefore, proceed to investigate the effect of the 1918 amendment of Section 35.

III.

The 1918 amendment of Section 35 extends the penalty thereof to false claims against corporations in which the United States is a stockholder and to certain instances of disposal of property belonging to the Army and Navy. The requisite element of financial or property damage to the Government is preserved in the amendment.

The cigars were duty free. By the delivery of the cigars to the defendant in error upon the furnishing of bond the Government did not suffer any financial or property loss. The only purpose of the bond was to protect the collector personally. And the collector by the delivery of the cigars to defendant sustained no financial or property loss.

The Government is mistaken in its assertion (p. 12) that there are no decisions construing Section 35 as amended in 1918.

In *United States* v. *Bowman*, 260 U. S. 94, an indictment for conspiracy to defraud the United States Shipping Board Emergency Fleet Corporation, under Section 35 of the Criminal Code, as amended in 1918, this court, in holding that a special declaration that jurisdiction over a conspiracy to defraud the United States Government by presenting false claims for payment shall extend to acts committed on the high seas is not necessary to make such acts punishable in the United States, since such intent will be inferred from the nature of the acts, per Mr. Chief Justice Taft, at 96 says:

> "The first count charged a conspiracy by the defendants to defraud the Fleet Corporation, in which the United States was a stockholder, by obtaining and aiding to obtain the *payment and allowance* of a false and fraudulent claim against the Fleet Corporation. It laid the offense on the high seas, out of the jurisdiction of any particular state, and out of the jurisdiction of any

district of the United States, but within the admiralty and maritime jurisdiction of the United States * * *. (101) It (Section 35 of the Criminal Code) is directed generally against whoever presents a false claim against the United States, knowing it to be such, to any officer of the civil, military, or naval service, or to any department thereof, *or any corporation in which the United States is a stockholder,* or whoever connives at the same by the use of any cheating device, or whoever enters a conspiracy to do these things. **The section was amended in 1918 to include a corporation in which the United States owns stock.** That corporation was expected to engage in and did engage in, a most extensive ocean transportation business, and its ships were seen in every port of the world open during the war. The same section of the statute protects the arms, ammunition, stores, and property of the Army and Navy from fraudulent devices of a similar character. We cannot suppose that when Congress enacted the statute or amended it, it did not have in mind that a wide field for such frauds upon the government was in private and public vessels of the United States on the high seas and in foreign ports and beyond the land jurisdiction of the United States, and therefore intended to include them in that section."

In *Kurzrock* v. *United States,* 1 Fed. (2d Series) 209, the Circuit Court of Appeals for the Eighth Circuit in affirming a conviction of an internal revenue agent who had defrauded the Government by receiving payment on padded and false expense accounts says of the effect of the 1918 amendment of Section 35 of the Criminal Code (210):

> *"The part of the section defining the crime here charged remains substantially as it was in the original Act* (12 Stat. 696); *the statute plainly condemns the first step that may be taken in an attempt to obtain from the United States money by means of a fraudulent claim, and declares it to be a criminal act."*

As shown by the comparison of Section 35 as originally enacted and as amended in 1918 (p. 21, *ante*), the only purpose of the amendment was to include within the inhibitions of Section 35 the presentation of false claims against cor-

porations in which the United States is a stockholder and the false deprivation of certain property belonging to the Army or Navy. Not a word appears in the amendment to indicate any intention to extract or withdraw from the section the element of financial or property loss to the Government. Nor is there any language therein from which the most fanciful implication could deduce the intent to include cases involving, in the language of this indictment, "a perversion and obstruction of the custom house function thereof and of the proper and orderly administration of the laws of the United States and regulations of said department in that behalf made." (Rec. 1.)

The recent decisions upon the 1918 amendment are borne out by a reference to the legislative proceedings incident to the passage of the amendment. The nature of the 1918 amendment is such as to make applicable the statement of Chief Justice Fuller in *United States* v. *Burr,* 159 U. S. 78, 85:

> "In these circumstances we are entitled to avail ourselves of such light as the history of the steps taken in the enactment of the law, as disclosed by the legislative records, may afford."

Though the legislative account of the purpose of the 1918 amendment is somewhat lengthy, the importance of an understanding thereof in the construction of the amendment constrains us to subjoin same at this juncture.

Congressional Record, Vol. 56, part 11, (65th Congress) page 11118, October 3, 1918, shows the following debate in the House of Representatives on the present Section 35 of the Penal Code as amended in 1918, but then the House Committee Amendment of Senate Bill No. 3470:

> "AMENDMENT TO SECTION 35 OF THE CRIMINAL CODE.
>
> The next business on the calender for Unanimous Consent was the bill S. 3470 a bill to amend Section 35 of the Criminal Code of the United States.
>
> The title of the bill was read.

THE SPEAKER *pro tempore*. Is there objection to the present consideration of the bill?

MR. STAFFORD. Mr. Speaker, it is not a long bill, and I ask that it be read before the objection stage is passed.

The SPEAKER *pro tempore*. The clerk will read.

The Clerk read as follows:

'Be it enacted, etc. That Section 35 of the Criminal Code of the United States be, and the same hereby is, amended to read as follows:

"Sec. 35. And whoever shall purchase, or receive in pledge, from any person any arms, equipment, ammunition, clothing, military stores, or other property furnished by the United States, under a clothing allowance or otherwise to any soldier, sailor, officer, cadet, or midshipman in the military or naval service of the United States or of the National Guard or Naval Militia, or to any person with the land or naval forces and subject to military or naval law, shall be fined not more than $500 and imprisoned not more than two years."

The committee amendment was read as follows:

On page 1, line 6, after Section 35, insert:

'SEC. 35. Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statement or representations, or make or use or caused to be made or used any false

bill, receipt, voucher, roll, account, claim, certificate or affidavit, deposition, knowing the same to contain any fraudulent or fictitious statement or entry; or whoever shall take and carry away or take for his own use or for the use of another, with intent to steal or purloin, any personal property of the United States, or any branch or department thereof, or any corporation in which the United States of America is a stockholder; or whoever shall enter into any agreement, combination or conspiracy to defraud the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim; and whoever, having charge, possession custody, or control of any money or other public property used or to be used in the military or naval service, with intent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, or wilfully to conceal such money or other property, shall deliver or cause to be delivered to any person having authority to receive the same any amount of such money or other property less than that for which he received a certificate or took a receipt; or whoever, being authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing or other property so used or to be used, shall make or deliver the same to any other person without a full knowledge of the truth of the facts stated therein and with intent to defraud the United States, or any department of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than 10 years or both.'

Page 4, line 5, after the word 'law' insert the 'words having knowledge or reason to believe that the property has been taken from the possession of the United States or furnished by the United States under such allowance.'

Page 4, line 8, after the figures '$500' strike out the word 'and' and insert in lieu thereof the word 'or,'

The SPEAKER *pro tempore*. Is there objection to the present consideration of the bill?

MR. GREEN of Iowa. Mr. Speaker, reserving the right to object, unless there is some one who can give some

explanation of this bill, I shall object to it, because it seems to me to be very awkwardly worded.

MR. IGOE. *Mr. Speaker, the chairman of the committee is not present, but the only amendments to the existing law are the extension of the penalty of this act to false and fraudulent claims that are presented against corporations in which the United States is a stockholder,* and also the punishment of the disposal of the property belonging to the Army or Navy and pledging it, or selling it or disposing of it wrongfully.

MR. MONDELL. Does the gentleman say there was no change of the present law relative to the receiving or purchasing or pledging stores that had been received?

MR. IGOE. I say that there is a provision ,and the gentleman will find it in the printed bill on page 3, line 22:

'And whoever shall purchase, or receive in pledge, from any person any arms, equipment, ammunition, clothing, military stores or other property furnished by the United States,' etc.

That as I recall it, was all there was to this bill as it came from the Senate, *and to it was subsequently attached the rest of Section* 35 *as amended to extend the law to false and fraudulent claims made against a corporation in which the United States is a stockholder.*

MR. GREEN of Iowa. Do I understand from what the gentleman has said that we had no such cases before?

MR. IGOE. Of corporations in which the United States was a stockholder?

MR. GREEN of Iowa. I do not believe the sale or pledge of such property was fully covered. This property is held under an allowance, and I do not believe it was fully covered by the present law.

MR. MONDELL. In all these years have we had no legislation making it a felony to receive uniforms, arms, accouterments, or military material?

MR. IGOE. The law as found in the present Section 35 does not fully cover the situation. It does not include cadets and midshipmen. This amendment includes them and also the National Guard, Naval Militia, and persons accompanying, serving, or retained with the land or naval forces and subject to military or naval law.

MR. GREEN of Iowa. I would say to the gentleman that I had supposed it was covered by existing law. But this, having been passed by the Senate, I suppose some one must have looked into the matter very carefully.

MR. IGOE. That was my understanding.

MR. GREEN of Iowa. Now, was this amendment that is on the last page put in by the Military Committee of the House or the Military Committee of the Senate?

MR. IGOE. That was put on by the Judiciary Comittee, so that to be punishable, the purchaser must have some knowledge or reason to believe that the property had been taken from the possession of the United States. In some cases it might be reasonably supposed that the property had rightfully come into the possession of the seller.

MR. GREEN of Iowa. Well Mr. Speaker, while the matter is not quite as clear as I would wish, I believe I shall not object.

The SPEAKER *pro tempore*. Is there objection to the present consideration of the bill? [After a pause] The chair hears none. The question is on agreeing to the committee amendments. Is a separate vote demanded on any one amendment? If not, the vote will be taken en gross.

The question was taken, and the committee amendments were agreed to.

The bill as amended was ordered to be read a third time, and passed."

In this condition the bill came before the Senate on October 14, 1918, and on Senator Overman's motion that the Senate concur in the amendments of the House, the motion was agreed to (Congr. Rec. (65th Congr. 2d Sess.) Vol. 56, part 11, page 11214).

Before the 1918 amendment Section 35 and its precursor statutes* stood for fifty-five years as the law penalizing false claims against the Government whereby the Government is

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* R. S. 5438, Act of March 2, 1863, ch. 67; 12 Stat. L. 696, 698, as amended by the act of May 30, 1908, ch. 235, 35 Stat. L. 555.

subjected to financial or property loss. A settled policy had therefore arisen and had become part of the construction of the section.

This court has held that an existing system of legislative provision is never repealed by amendment in the absence of express language or necessary implication.

In *Wilmot* v. *Mudge*, 103 U. S. 217, the following situation was presented: A clause of the 1867 Bankruptcy Act declared that no debt created by fraud should be "discharged under this act." In 1874, Congress legislating on the subject of bankruptcy passed an act providing for a composition proceeding which should discharge the bankrupt, and declared in express terms that the composition should be binding on all creditors. Notwithstanding the positive language of this last act it was held that under it debts created by fraud were not discharged, and for the reason that all the statutes, sections, and provisions passed by Congress on the subject of bankruptcy were to be interpreted as parts of one entire system, and if possible by any reasonable interpretation all were to be made to stand together. At page 218, Mr. Justice Miller says:

> "The phraseology of the original Statute of Bankruptcy of 1867, was that no such debt 'shall be discharged under this act;' and an argument is made that while such debt might not be discharged under the Act of 1867, it might be under the composition provided for by the Act of 1874, because the latter was a different Act. We are of opinion that the language of the Revised Statutes expresses the true construction of the Act of 1867, namely: that no such debt should be discharged by the proceedings which the Bankrupt Law of the United States authorized. The language adopted in the Act of 1867, was appropriate, because that was the only Bankrupt Act then in existence, and established a complete system in itself. When the Revised Statutes came to be enacted, many amendments had been made to the original Act, and as none of them were supposed to affect the principle that debts founded in fraud should

> not be discharged by bankrupt proceedings, it was proper to say so * * *. But, as we have already said, *these several statutes, sections and provisions are to be construed as parts of one entire system of bankrupt law. No positive enactment found in one part of it is to be considered as repealed by another unless it be by express language, or by necessary implication.*"

As the Government has virtually conceded that this indictment could not have been maintained under Section 35 before 1918, an affirmance of the judgment of the District Court, we respectfully submit, must follow. To quote the government (Brief 16):

> "Prior to the amendment of 1918, Section 35 of the Penal Code was primarily a 'false claims' statute; and a charge of fraud not committed in the presentation of a 'claim' would have been insufficient. But by the amendment of 1918, the scope of the section was materially widened and the element of a 'claim' is no longer essential."

The contention of the Government that the 1918 amendment to Section 35 has withdrawn therefrom the element of financial or property damage to the Government is denied by

(*a*) A proper construction of the amendment itself;

(*b*) The settled course of construction of amendments to existing systems of legislation;

(*c*) The legislative proceedings relating to the passage of the amendment;

(*d*) The fact that this court in the *Bowman case, supra,* in passing upon the amendment did not intimate that the purposes of the original Section 35 were in any wise enlarged or extended.

IV.

Decisions under Section 37 of the Penal Code penalizing conspiracies to defraud the Government do not apply to Section 35.

At page 12 of its brief the plaint of the prosecution is

> "In the absence of decisions construing this section (35) we may properly resort to decisions under Section 37, penalizing conspiracies to defraud the Government."

We have already demonstrated that there is no absence of decisions on this section, as amended; that both this court and the Court of Appeals for the Eighth Circuit have construed Section 35 as amended in 1918 (*ante*, p. 26); and that such recent construction has declared the old purpose of the section to confine itself to false claims whereby the Government sustains financial or property damage still remains.

But as the Government is serious in its contention it is our duty to reply. We submit the most casual persual of the language of Section 37 shows that its reference to *defrauding* the Government is entirely different from the expressed purpose and object of Section 35. Consider the recital of Section 37:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States **in any manner or for any purpose**, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined," etc.

True this court held in *Haas* v. *Henkel*, 216 U. S. 462, that the element of financial loss to the Government is not necessary to make a case under Section 37; but in so holding Mr. Justice Lurton at page 479, specifically states:

> "* * * it is not essential that such a conspiracy shall contemplate a financial loss or that one shall result. *The*

statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government."

In *Hammerschmidt* v. *United States*, 265 U. S. 182, Mr. Chief Justice Taft, in explaining the significance of the above observation of Mr. Justice Lurton, at page 187, says:

> "It is obvious that the writer of the opinion and the court were not considering whether deceit or trickery was essential to satisfy the defrauding required under the statute. The facts in the case were such that that question was not presented. The deceit of the public, the trickery in the advance publication secured by bribery of an official, and the falsification of the reports made the fraud and deceit so clear as the gist of the offenses actually charged that their presence was not in dispute. The sole question was whether the fraud there practiced must have inflicted upon the Government pecuniary loss, or whether its purpose and effect to defeat a lawful function of the Government and injure others thereby was enough. That was all that Mr. Justice Lurton's words can be construed to mean."

To restrict the operation of Section 37 to that of a "false pretence" statute would be to erase therefrom the alternative provision "*to commit any offense against the United States.*" As well said in *United States* v. *Foster*, 233 U. S. 515, 526:

> "Section 37 of the Criminal Code makes it an offense to conspire to defraud the United States *in any manner or for any purpose.*"

And this court in its original construction of Section 37 came to the conclusion that no financial or pecuniary loss was necessary because of the words used in the statute "in any manner or for any purpose." It is by no means certain that had Section 37 contained only the word "conspiracy to defraud the United States" without the additional words "in any manner or for any purpose," that this court would

in construing the Section, have held all conspiracies even though they did not have for their object pecuniary or financial loss to the Government within the purview of this section.

Consider the recital of the 1918 amendment to Section 35:

> "Or for the purpose and with the intent of *cheating and swindling or defrauding* the United States or any department thereof, or any corporation in which the United States of America is a stockholder."

It is manifest that cheating and swindling or defrauding refer solely to pecuniary or property damage or injury.

A good definition of "cheating" is given in *People* v. *Cummings*, 114 Calif. 437, 439, 46 Pac. 284:

> "*Cheating* at common law was a fraud perpetrated by means of a false symbol or token, such as selling goods by false weights or measures, or other like act or thing of a character calculated to deceive and defraud the public or the individual *to their pecuniary injury*, and against which ordinary prudence could not guard."

And the term "swindling" is defined in *Cunningham* v. *Baker*, 104 Ala. 160, 171:

> "The word *swindling* has no legal or technical meaning; and commonly, it implies, that there has been 'recourse to petty and mean artifices *for obtaining money.*' which may or may not be strictly illegal."

The word "defrauding" in association with the terms "swindling" and "cheating" carries with it the significance of pecuniary or property injury or damage. *Noscitur a sociis* is a rule of construction of statutes. (*Virginia* v. *Tennessee*, 148 U. S. 503, 519; *United States* v. *Rodgers*, 150 U. S. 249, 278). As well said in *Wheaton* v. *Peters*, 8 Pet. 591, 661:

> "There is no mode by which the meaning affixed to any word or sentence by a deliberative body, can be so well ascertained, as by comparing it with the words and sentences with which it stands connected."

Section 35 as amended is a highly penal statute. Of such statutes Chief Justice Marshall in *United States* v. *Wiltberger,* 5 Wheat. 76, 96, said:

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment."

So in *Thorn* v. *Brown,* 257 Fed. (C. C. A. 8th Cir.) 519, 524:

> "For courts may not lawfully extend the denunciation of a penal statute to a class of persons excluded from its effect by its plain terms, even though in their opinion the acts of the latter are as heinous as those of the members of the class whose deeds the statute penalizes."

And as to the clause of the amendment reciting:

"Shall knowingly and willfully falsify or conceal or cover up by any *trick, scheme* or *device,*" etc., the very excerpt from *Hammerschmidt* v. *United States,* 265 U. S. 182, 188, at pages 13 and 14 of its brief, says:

> "It is true that the words to 'defraud' as used in some statutes have been given a wide meaning, wider than their ordinary scope. *They usually signify the deprivation of something of value* by trick, deceit, chicane or overreaching."

We submit the Government's comparison of Section 35 with Section 37 is wholly unwarranted and contrary to the express ruling of this court in *United States* v. *Bowman,* 260 U. S. 94.

V.

There is no element of a "claim" against the Government in the instant case.

The cigars were free of duty. The Government lost nothing; and the collector lost nothing.

In the absence of statutory provision making it a crime to deceitfully procure the exercise of the collector's discretion to accept a bond, it is not a criminal offense to do so. And under Section 35, both in its original and amended form, to so deceive the collector into accepting a bond is not an offense because the bond under the Customs Regulations is for the protection of the collector personally and not for the protection of the Government. Clearly Section 35 does not apply unless a direct liability or loss is incurred by the Government itself.

It will, therefore, subserve no purpose to analyze the decisions cited by the Government in the fourth division of its argument (p. 18 *et seq.*) defining the meaning of the word "claim."

At page 21, the Government reverts to its erroneus comparison of Section 35 of the Criminal Code with other sections thereof and says:

> "It has repeatedly been held that offenses which involve the presenting of false claims against the United States are not confined to claims for money alone, or to matters over which the Court of Claims might have jurisdiction."

To support that conclusion Government's counsel cite

> *United States* v. *Davis,* 231 U. S. 183 (indictment for conspiracy to violate Sections 28 and 29 of the Penal Code.)

United States v. *Spaulding,* 3 Dak. 85, is a territorial decision in a prosecution for presenting and *transmitting* a fraudulent preemption entry of public lands. (Under R. S. 5421, now Section 29 of the Penal Code.)

United States v. *Bickford,* 24 Fed. Cas. No. 14591, (indictment under Act of March 3, 1823, 3 Stat. L. 771 for transmission of false papers to the pension office in support of application for bounty land).

United States v. *Wilcox,* 28 Fed. Cas. No. 16,691 (also an indictment under the Act of March 3, 1823, for the transmission of forged papers in support of a claim for bounty land).

Sections 28 and 29 of the Penal Code and the old Act of March 3, 1823, are not even statutes of a parallel nature to Section 35, which through all of its mutations since 1863 (Act of March 2, 1863, Ch. 67, 12 Stat. L. 696, 698) has consistently stood as a false claims statute directed against pecuniary or property damage to the Government.

In Sections 28 and 29 of the Code the gravamen of the respective offenses is the forging or counterfeiting of evidence presented as a basis of or to support a claim against the Government. Certainly the defendant in error in the instant case could not have been indicted under either Section 28 or 29 of the Penal Code.

Conclusion

To recapitulate:

The following propositions are sustained by the authorities and by the construction of Section 35 of the Penal Code as amended in 1918:

1. Prior to the 1918 amendment Section 35 of the Penal Code was the Federal false claims statute wherein the gist

of the offense interdicted was financial or property loss by the Government.

2. The 1918 amendment to Section 35 has not changed its scope and object to reach cases where the Government does not sustain financial or property damage.

3. The Customs Regulations of 1915 (Art. 220) expressly authorize the collector to permit entry to be made by the consignee named in the bill of lading upon the filing of a bond without the production of a bill of lading. No reservation appears therein as to indebtedness to the consignor.

4. Mere moral laxity, or even intentional deception of the collector is not a violation of Section 35 as amended unless there is financial or property loss sustained by the Government.

5. Under all of the Tariff Acts which make false representations, etc., relating to entry of merchandise a criminal offense the holdings cited *infra* conclusively show that financial or pecuniary loss to the Government is the gist of the offense. And the customs laws are the specific acts controlling offenses of the nature sought to be charged in this indictment. In seeking to sustain the indictment the Government asks this court to give to an amended general statute, Section 35 of the Penal Code, an unwarranted construction so as to make acts which have been held by the courts not punishable under the specific customs statutes a crime under the general statute.

Wherefore we submit the judgment of the District Court for the Northern District of Illinois, Eastern Division, sustaining the demurrer to the indictment should be affirmed.

Respectfully submitted,

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